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Supreme Court of the United States

October Term, 1971

No. 71-1315

HOWARD ALEXANDER, FRANK COLLIER, VILLAGE BOOKS, INC., MEDIA ARTS, AND GUILD PRESS, LTD.,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF OF RESPONDENT

QUESTIONS PRESENTED

1. Is § 18.1-236.3, of the Annotated Code of Virginia repugnant to the Constitution of the United States of America by prohibiting a jury trial to determine obscenity and by permitting a prior restraint on literary material, and by providing for a city-wide community standard for judging obscenity rather than a national community standard, and by providing for establishing a fact, through civil proceedings, for use in criminal prosecution, all in violation of the First, Fifth, Sixth, Seventh, and Fourteenth Amendments to the Constitution of the United States of America?

2. Are the approximately 300 books and magazines, enjoined from sale by the Court below, obscene in the constitutional sense, without sale or exhibition to juveniles, obstrusive advertisnig or pandering?

3. Whether the display of any sexually oriented pictorial magazines for commercial sale, when surrounded by notice to the public of their nature and by reasonable protection against exposure of the magazines to juveniles, is constitutionally protected?

STATEMENT OF THE CASE

On May 19, 1970, the Commonwealth's Attorney of the City of Portsmouth presented a petition to the Hustings Court asking that certain books named in the petition be adjudged obscene as set forth in § 18.1-236.3 of the Code of Virginia. The Hustings Court issued a writ of subpoena duces tecum returnable on May 22, 1970, at which time the petitioners produced copies of the named books. A motion to quash the subpoena duces tecum was overruled and the books were left in the custody of the Court. On June 3, 1970, the Hustings Court issued a rule to show cause why the books should not be adjudicated obscene. On June 12, 1970, the petitioners appeared through counsel and moved for a stay of the proceedings which was denied. The petitioners filed an answer to the petition and a motion to dismiss the petition, which was heard by the Court on August 19, 1970. Following the denial of the petitioners' motion to dismiss, the case was tried by the Court on November 4 and 5, 1970.

At the commencement of the trial on November 4, 1970, it was stipulated that the petitioners' book store did not sell or distribute any literature to juveniles (A. 20). In addition, the Court directed the return of those books which it had

previously determined that there was no probable cause to believe they were obscene. The first witness to testify on behalf of the Commonwealth was Robert Holley, a resident of the City of Portsmouth for fifteen years (A. 21). Mr. Holley testified that five to seven years before he had served as chairman of an area wide Chamber of Commerce committee composed of representatives of Norfolk, Virginia Beach, Portsmouth, Newport News, Suffolk, and Nansemond County, the purpose of the committee being to investigate obscene matters in the area (A. 23, 24). The committee purchased magazines from different locations throughout the community and by discussing the magazines with civic groups and organizations, the committee was able to determine what the community standard was throughout the whole area (A. 23). About a year and a half prior to trial, Mr. Holley did extensive investigation into obscenity in the Portsmouth area and by sampling contacted the equivalent of 30,000 people in the Portsmouth area (A. 23, 24). During this time Mr. Holley met with various clubs and organizations in the area and displayed magazines and films depicting sexual portrayals of all types. These clubs included the Navy wives' clubs, which included persons from various parts of the country (A. 26). During this investigation, Mr. Holley was not only able to determine what the community standard was, but also formed the opinion that the local standard was essentially the same as the national standard. His opinion concerning the national standard was based upon his travels on the East Coast and in talking with people from throughout the country (A. 30). Upon this background, Mr. Holley was considered as an expert winess and allowed by the Court to testify (A. 30). Mr. Holley testified that he had examined each of the books in question (A. 35), and that in his opinion the majority of the books were patently

offensive and did not meet the community standard (A. 38, 39). Mr. Holley also testified that the books taken as a whole appealed to prurient interest in sex and the majority of the books did not have any redeeming social value (A. 40). Mr. Holley did state that he did not consider nudity alone as violating the community standard, but that nude persons in suggestive poses depicting sexual intercourse or sodomy did violate the community standard (A. 42, 45).

The Commonwealth, next offered the testimony of Dr. Donald Lee Mingione. Dr. Mingione specializes in the field of psychiatry and has been practicing in Portsmouth for nine years (A. 47). Dr. Mingione was qualified as an expert psychiatrist and was qualified to testify concerning social values (A. 49). Dr. Mingione testified that he had examined each of the books in question (A. 47) and in his opinion the majority, if not all of the books, appealed to the prurient interest (A. 49). He further testified that none of the books possessed any redeeming social value (A. 51).

The Commonwealth then introduced Richard Messenger who stated that he was the owner of Messenger Printing Company, had lived in Portsmouth for forty-three years and been in the printing business for twenty years (A. 53, 54). Mr. Messenger testified that he does printing for the Government and firms outside of the State of Virginia and also receives bulletins concerning what is to be printed and not to be printed in the obscenity field. Mr. Messenger also testified that he had attended meetings with other printers and publishers to discuss standards of printing obscene materials (A. 54). Mr. Messenger examined all of the books in question (A. 54) and in his opinion they would appeal to the prurient interest (A. 55).

The petitioners offered the testimony of Dr. Wilbur Hammond, a resident of Arlington, Virginia, who is engaged

in the private practice of medicine, specializing in psychiatry (A. 65). Dr. Hammond spent about ten minutes looking at from fifteen to twenty of the books (A. 71, 72) and gave his opinion that the books involved would not appeal to the prurient interest (A. 68). Dr. Hammond based his conclusion on the fact that he had shown similar magazines to his patients and fellow doctors at St. Elizabeth's Hospital (A. 68). Dr. Hammond further testified that there are only a few items that would be entirely without redeeming social value and that hard core pornography would have some redeeming social value (A. 73).

Thereafter the petitioners presented the testimony of Dr. Donald W. Nachand, a practicing psychologist, employed at the Eastern Shore State Hospital, in Cambridge, Maryland (A. 82), who was of the opinion that the books would not appeal to the prurient interest of the average individual (A. 83). Dr. Nachand testified that he had examined only approximately one-half of the books in question (A. 85). He further testified that he did not believe these books exceeded the community standards and that they probably had some socially redeeming value (A. 83). Dr. Nachand further testified that hard core pornography is not necessarily obscene (A. 91).

Dr. Herman Kastner, a psychiatrist engaged in private practice in the State of Maryland, testified that the books may appeal to the prurient interest of a group of people (A. 97). He further testified that he would not feel qualified to say what standards are relative to prurient interests for most people in that it differs from person to person and is an individual concept (A. 99, 100). Dr. Kastner in answer to a question propounded by the Court, stated that the magazines might be considered obscene by a majority of the citizens (A. 103).

ARGUMENT

I.

Section 18.1-236.3 Of The Code Of Virginia Is Constitutional.

Petitioners first assert that § 18.1-236.3 (set forth in petitioners' petition Appendix pgs. 19a-21a), is unconstitutional in that it does not provide for trial by jury. Subsection 8 of this section specifically provides that the hearing shall be conducted by the court in accordance with the rules of civil procedure applicable to the trial of cases by the court without a jury.

Section 18.1-236.3 is not a criminal proceeding, but rather is an in rem proceeding. The petition is directed against the book or books considered to be obscene, and this section provides no criminal penalties. This proceeding is a creature of statute and was unknown at common law. It has long been well settled that neither the State nor Federal Constitution guarantees or preserves the right of trial by jury except in those cases where it existed when these constitutions were adopted. *Bowman* v. *Va. State Entomologist*, 128 Va. 351 (1920); 50 C.J.S., Juries § 10.

As a general rule, jury trials may be properly denied in purely statutory actions or proceedings. 47 Am. Jur. 2d, Jury, § 41.

Although the Supreme Court was not called upon to decide the issue of a jury trial in *Kingsley Books* v. *Brown*, 354 U.S. 436 (1957), it nevertheless approved a New York statute which set forth the procedure to enjoin the distribution of obscene books without the benefit of a jury trial. See also *Village Books, Inc.* v. *State's Attorney, Prince George's County*, 282 A.2d 126 (Md. 1971).

Petitioners next urge that the statute is unconstitutional in that it provides for a prior restraint without the benefit of an adversary hearing. Subsection 5 provides that when

an order to show cause is issued the court may issue a temporary restraining order against the sale or distribution of the book alleged to be obscene.

This Court in *Freedman* v. *Maryland*, 380 U.S. 51 reemphasized its previous holding that prior restraint is not necessarily unconstitutional under all circumstances.

In the recent case of *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971), this Court had occasion to review its decision in *Freedman* as it applied to 19 USC § 1305 (a). In reviewing *Freedman*, this Court said it had struck down the state scheme for administrative licensing of motion pictures, holding "that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." 380 U.S. at 58. This Court continued that to insure a judicial determination occurs promptly so that administrative delay does not in itself become a form of censorship, this Court further held, (1) there must be assurance, "by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film"; (2) "(a)ny restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution"; and (3) ". . . the procedure must also assure a prompt final judicial decision." (Id. at 58-59).

Section 18.1-236.3 provides for just the type of judicial determination in an adversary proceeding envisioned in *Freedman*. In addition, this section provides that any prior restraint to preserve the status quo will be for a short fixed period. Subsection 5 provides that when a show cause order is issued and upon four days' notice the court may

issue a temporary restraining order. Subsection 4 (d) requires that the show cause order be returnable 21 days after service. Subsection 8 provides that if appearance is entered and an answer filed, the court shall order the proceeding set on the calendar for a prompt hearing.

Petitioners further contend that § 18.1-236.3 is unconstitutional in that it establishes an improper standard of measuring contemporary community standards. Petitioners argue that a national standard should apply whereas the code section provides for a local standard.

A cogent argument for community standards was made by then Chief Justice Warren and Justice Clark in a separate opinion in *Jacobellis* v. *State of Ohio*, 378 U.S. 184 (1964), when they said:

> "It is my belief that when the court said in *Roth* that obscenity is to be defined by reference to 'community standards,' it meant community standards—not a national standard, as is sometimes argued. I believe that there is no provable 'national standard' and perhaps there should be none. At all events, this court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one. It is said that such a 'community' approach may well result in material being proscribed as obscene in one community but not in another, and, in all probability, that is true. But communities throughout the Nation are in fact diverse, and it must be remembered that, in cases such as this one, the court in confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals." Id. at 200.

In the recent case of *Hoyt* v. *Minnesota*, 399 U.S. 524, 90 S.Ct. 2241 (1970), Mr. Justice Blackmum, with whom The Chief Justice and the late Mr. Justice Harlan joined opined that:

> "I am not persuaded that the First and Fourteenth Amendments necessarily prescribe a national and uniform measure—rather than one capable of some flexibility and resting on concepts of reasonableness—of what each of our several States constitutionally may do to regulate obscene products within its borders."

Numerous courts across the nation have recognized either a statewide or local community standard. *People* v. *Kaplan,* 23 Cal. App. 3d Supp. 9, 100 Cal. Rptr. 372 (1972); *Hunt* v. *State,* 475 S.W.2d 935 (Tex. Crim. App. 1972); *Davidson* v. *State,* 251 So.2d 841 (Fla. 1971); *McKinney* v. *State,* 254 So.2d 714 (Ala. 1971); *State* v. *Henry,* 198 So.2d 889 (La. 1967).

It would appear to be impossible and impractical to establish a national standard. The values and tastes of this nation's citizens vary from place to place, and a national standard would not allow any flexibility in recognizing these variances.

It would be highly improbable if not next to impossible to find an expert who could express an informed opinion upon the standards of citizens across the country. One can envision the mythical expert who would express knowledge about the free style of life, strip joints, etc., which abound in metropolitan areas such as New York, Chicago, and Los Angeles, but who would not have the faintest idea of the life style of citizens of Butte, Montana or Lexington, Virginia.

The Commonwealth submits that the constitution permits a state to adopt its own standard as long as it is consistent with due process; and in light of the diversity of opinion that exists in our nation, it would be impossible to establish a workable national standard.

Petitioners lastly argue that § 18.1-236.3 is unconstitutionally vague in that it provides for establishing scienter

for use in a criminal prosecution without affording the defendant his constitutional right to a trial by jury on all issues of fact in a criminal case, and further that while the section provides for a temporary restraining order it does not provide for a permanent injunction.

In the first instance § 18.1-236.3 is a proceeding to determine whether specified books are obscene and does not conclusively establish knowledge or scienter. The question of knowledge or scienter in a criminal prosecution would still be an issue to be resolved by a jury, and the proceedings under § 18.1-236.3 are merely intended as an aid in that determination where thought to be useful or desirable.

In the second place once books have been determined to be obscene they are not entitled to the protection of the Constitution, *Roth* v. *United States,* 354 U.S. 476 (1957), and it would appear logical that their distribution could be permanently enjoined.

For the reasons aforementioned, it is submitted that § 18.1-236.3 is constitutional.

II.

The Books And Magazines Are Obscene Without Sale Or Exhibition To Juveniles, Obstrusive Advertising Or Pandering.

The petitioners contend the judgment of the court below was contrary to the law and evidence, and rely mainly upon *Redrup* v. *New York,* 386 U.S. 767 in which they say that this Court reaffirmed the prior definition of obscenity in *Roth,* and added three qualifications: (1) Protection of juveniles; (2) Assault upon individual privacy by publication in a manner so obstrusive as to make it impossible for an unwilling individual to avoid exposure to it; and (3) Pandering which was found in *Ginzburg.*

The Commonwealth submits that any such contention has been completely laid to rest, even if it ever had any validity.

In *United States* v. *Reidel*, 402 U.S. 351 (1971) the defendant was charged with a violation of 18 USC § 1461, which prohibits the knowing use of the mails for the delivery of obscene matter. Reidel had advertised in the newspaper that a person seeking his illustrated booklet must be over 21 years of age, and one of the booklets had been mailed to a postal inspector stipulated to be over 21. The District Court dismissed the indictment and concluded that § 1461 could not be constitutionally applied "where obscene material is not directed at children, or it is not directed at an unwilling public, where the material such as in this case is solicited by adults . . . ." This Court rejected the reasoning of the District Court and reversed the judgment.

This Court held that *Roth* squarely placed obscenity and its distribution outside the reach of the First Amendment and refused to overrule *Roth*. The court explicitly held that whether the laws of obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age was a legislative matter.

The Commonwealth submits that the court below applied the proper standard for determining obscenity as set forth by this court in *Roth*.

The court below received evidence submitted by experts concerning the community standards and social value and upon conflicting evidence adjudged the books obscene.

Petitioners concede that some of the books and magazines contain photographs depicting simulated erotic activities that suggest the consummation of sexual activities. The Commonwealth submits these photographs leave nothing to the imagination and are obscene. *People* v. *Abronovitz*, 327 N.Y.S.2d 137 (1971); *Slaton* v. *Paris Adult Theatre I*, 185 S.E.2d 768 (Ga. 1971).

This Court has held that the constitution protects photographs of nudes featuring emphasis on the genital area. However, these decisions do not support the thesis that photographs depicting males suggesting sex acts with other males, or females, or females suggesting sex acts with other females are contitutionally protected. *United States* v. *New Orleans Book Mart, Inc.*, 328 F.Supp. 136 (E.D. La. 1971); *Hunt* v. *Keriakos*, 428 F.2d 606 (1st Cir. 1970).

III.

The Display Of Any Sexually Oriented Pictorial Magazines For Commercial Sale, When Surrounded By Notice To The Public Of Their Nature And By Reasonable Protection Against Exposure Of The Magazines To Juveniles Is Not Constitutionally Protected.

In *Roth* v. *United States*, 354 U.S. 476 (1957), this Court held that obscenity was not within the area of constitutionally protected speech. By definition obscenity was said to lack the valuable ideas whose dissemination the First Amendment was designed to ensure. *Roth* has not been overruled and was held to be the law in two recent decisions. *United States* v. *Reidel*, 402 U.S. 351 (1971); *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971).

This Court's decision in *Stanley* v. *Georgia*, 394 U.S. 557 (1969), which held that the mere private possession of obscene matter cannot constitutionally be made a crime, has caused some to believe that the right to private possession of obscene materials carries with it a right to receive such materials through commercial sale. In announcing the decision in *Stanley*, Mr. Justice Marshall stated:

> "We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. *Roth* and the cases following that decision are not impaired by today's holding." 394 U.S. at 568.

On their faces, it would seem that *Roth* and *Stanley* are totally inconsistent with each other. However, this Court was quick to set straight this seeming inconsistency in *Reidel*. Mr. Justice White in delivering the opinion of the Court noted the limitations on the reach of *Stanley* when he said:

> "The District Court gave *Stanley* too wide a sweep. To extrapolate from Stanley's right to have and peruse obscene material in the privacy of his home a First Amendment right in Reidel to sell it to him would effectively scuttle *Roth*, the precise result that the *Stanley* opinion abjured. Whatever the scope of the 'right to receive' referred to in *Stanley*, it is not so broad as to immunize the dealings in obscenity in which Reidel engaged here—dealings that *Roth* held unprotected by the First Amendment." 402 U.S. at 355.

This Court further delineated the bounds of *Stanley* in *Thirty-Seven Photographs*, wherein the Court said:

> "Whatever the scope of the right to receive obscenity adumbrated in *Stanley*, that right, as we said in *Reidel*, does not extend to one who is seeking, as was Luros here, to distribute obscene materials to the public, nor does it extend to one seeking to import obscene materials from abroad whether for private use or public distribution." 402 U.S. at 376.

Thus, *Reidel* and *Thirty-Seven Photographs* clearly recognize that the States and the Federal Government retain broad power to regulate obscenity, particularly in the commercial field.

Since *Stanley* it has been argued that the First Amendment should protect the sale of obscene materials to consenting adults where reasonable precautions have been taken to prevent exposure to juveniles. This argument has been rejected by numerous courts. *State* v. *Muldowney*, 292 A.2d

26 (N.J. 1972); *Hoffman* v. *Dickinson Operating Co. Inc.*, 468 S.W.2d 26 (Mo. 1971); *City of Moline* v. *Walker*, 274 N.E.2d 9 (Ill. 1971); *Wilhoit* v. *U.S.*, 279 A.2d 505 (D.C. App. 1971); *People* v. *Luros*, 480 P.2d 633 (Calif. 1971), cert. den. 404 U.S. 824; *People* v. *Golden*, 97 Cal. Rptr. 476 (Cal. App. 1971); *State* v. *Shackman*, 29 Ohio Misc. 56, 278 N.E.2d 61 (1971); *Slaton* v. *Paris Adult Theatre I*, 185 S.E.2d 768 (Ga. 1971); *State* v. *McCluney*, 180 S.E.2d 419 (N.C. App. 1971); *McKinney* v. *State*, 254 So.2d 714 (Ala. 1971); *May* v. *Harper*, 250 So.2d 880 (Fla. 1971); *United States* v. *Brown*, 328 F.Supp. 196 (E.D. Va. 1971); *United States* v. *Thevis*, 329 F.Supp. 205 (M.D. Fla. 1971).

The Commonwealth submits that the commercial dissemination of obscene materials, regardless of what precautions are taken to advise adults of its content and to prevent exposure to juveniles, is not protected by the Constitution.

There is the position taken by some that if pornography were legalized, it would soon lose its interest for people, and eventually the traffic would end. However, a long time ago a District Judge predicted the rise in obscenity when he observed that:

> ". . . the appetite for such literature increases with the feeding. The more it is pandered to, the more insatiable its craving for something yet more vicious in taste." *United States* v. *Harmon*, 45 F. 414, 418 (D.C. Kan. 1891)

In *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 476 (1957), this Court pointed out that in an unbroken series of cases extending over a long stretch of the Court's history, it has been accepted as a postulate that "the primary requirements of decency may be enforced against obscene publications. In *Times Film Corp.* v. *Chicago*, 365 U.S. 43 (1961), this Court recognized that the constitutional guaranty of free-

dom of speech did not preclude a municipality from protecting its people against the dangers of obscenity in the public exhibition of motion pictures. And *Stanley* re-emphasized that *Roth* and cases following it discerned an important Federal and State interest in the regulation of commercial distribution of obscene material.

It should not be doubted that obscenity is a cancerous canker in our culture. President Richard M. Nixon has said:

> "Pornography can corrupt a society and a civilization. The people's elected representatives have the right and obligation to prevent that corruption.
>
> The warped and brutal portrayal of sex in books, plays, magazines and movies, if not halted and reversed, could poison the wellsprings of American and Western culture and civilization . . . .
>
> Alexis de Tocqueville, observing America more than a century ago, wrote: 'America is great because she is good—and if America ceases to be good, America will cease to be great.'
>
> We all hold the responsibility for keeping America a good country. American morality is not to be trifled with." N.Y. Times, Oct. 25, 1970, § 1, at 71, col. 5-8.

This Court in *Reidel* anticipated the move to eliminate the holding in *Roth* from obscene materials between consenting adults when Mr. Justice White commented:

> "It is urged that there is developing sentiment that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age." 402 U.S. at 357.

Justice White noted that the concepts involved in the law of obscenity were elusive and great expenditures of time and effort were expended in the enforcement of such laws. He further declared that the task of restructing obscenity laws belongs to "those who pass, repeal, and amend such ordinances."

The Commonwealth submits that if changes are desirable in the field of obscenity that such changes ought to eminate from the Legislatures.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment in this case be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert E. Shepherd, Jr., Assistant Attorney General of Virginia, of counsel for the respondent, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 11th day of September, 1972, I mailed 3 copies of the foregoing to Stanley M. Dietz, Esquire, 1029 Vermont Avenue, N.W., Washington, D. C. 20005, counsel for Petitioners.

ROBERT E. SHEPHERD, JR.
Assistant Attorney General